

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

PUGET SOUNDKEEPER ALLIANCE)
WASTE ACTION PROJECT;)
WASHINGTON PUBLIC EMPLOYEES)
FOR ENVIRONMENTAL)
RESPONSIBILITY; RESOURCES FOR)
SUSTAINABLE COMMUNITIES; and)
CITIZENS FOR A HEALTHY BAY,)

Appellants,)

v.)

STATE OF WASHINGTON,)
DEPARTMENT OF ECOLOGY,)

Respondent,)

And)

ASSOCIATION OF WASHINGTON)
BUSINESS and WASHINGTON STATE,)
DEPARTMENT OF)
TRANSPORTATION,)

Intervenors.)
_____)

PCHB NO. 00-173
(Construction Stormwater Permit)

ORDER DENYING AWB'S
MOTION TO DISMISS

The Association of Washington Business (AWB) has filed a Motion to Dismiss this case on the basis that the appeal was not timely filed. The matter came on for decision before the Pollution Control Hearings Board (Board) comprised of Robert V. Jensen, chair, James A. Tupper Jr. and Kaleen Cottingham. Administrative Appeals Judge, Phyllis K. Macleod,

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presided for the Board. The case was considered on the record without oral argument. In rendering this decision the Board considered the following material:

1. AWB's Motion To Dismiss.
2. Declaration of Lori A. Terry in Support with Exhibit.
3. Response to AWB's Motion to Dismiss.
4. Declaration of Greg Wingard
5. Declaration of Richard Smith with Exhibits.
6. AWB's Reply in Support of Motion to Dismiss.
7. Records and Files in the case.

The Department of Ecology (Ecology) did not file any documents relating to consideration of this motion. Having reviewed the record and deeming itself fully apprised in the matter, the Board makes the following decision:

Factual Background

Ecology developed the National Pollutant Discharge Elimination System and Waste Discharge Baseline General Permit for Stormwater Discharges Associated with Construction Activities (Construction Stormwater Permit) during the months leading up to October 2000. On October 4, 2000 the appropriate Ecology official signed the permit and it was sent for publication in the Washington State Register and mailed to parties. A formal Notice of Issuance was prepared which contained the following language regarding appeal of the permit:

Pursuant to RCW 43.22.B.310 the terms and conditions of the permit may be appealed on or before November 17, 2000. An appeal must be filed with the Pollution Control Hearings Board, [address]. In addition, a copy of this appeal must be served on the Department of Ecology [address]. The procedures and requirements for the appeal process are contained in RCW 43.21.B.310.

The terms and conditions of a general permit, as they apply to an individual discharger, are appealable within 30 days of the effective date of coverage of that discharger, in accordance with chapter 43.21B RCW. This appeal is limited to the general permit's applicability or nonapplicability to a specific discharger

Notice of Issuance (Ex. A. to Declaration of Richard A. Smith Responding to Ecology's Motion to Dismiss) at p. 2. The Notice of Issuance was published in the State Register on October 18, 2000. Formal notices were mailed to interested parties on or around October 18, 2000.

The appellants filed this appeal of the Construction Stormwater Permit on November 17, 2000 contending that the permit failed to comply with applicable legal standards. The appellants filed the appeal with the Pollution Control Hearings Board and served the Department of Ecology. AWB contends that the appeal must be dismissed because the appellants failed to file the appeal within thirty days of the issuance of the permit as required by WAC 173-226-190(1).

Analysis

AWB claims that the Board lacks jurisdiction over this case because the appeal was not filed within thirty days of the date the appropriate Ecology official signed the general permit. WAC 173-226-170(2). WAC 173-226-170 is part of a comprehensive set of regulations

promulgated by the Department of Ecology in WAC 173-226 establishing the process for developing, issuing and appealing NPDES general permits. WAC 173-226-190(1) sets forth procedures for appealing the terms of a general permit as they apply to a class of dischargers as follows: “The terms and conditions of a general permit as they apply to the appropriate class of dischargers are subject to appeal within thirty days of issuance of a general permit in accordance with chapter 43.21B RCW.”

AWB contends that this Ecology regulation defines the extent of Board jurisdiction over the permit appeal. The Board disagrees. RCW 43.21B.110 outlines the Board’s subject matter jurisdiction as including an appeal of “the issuance . . . of any permit.” The present appeal of a NPDES general permit falls squarely within the Board’s subject matter jurisdiction. The issue becomes whether the appeal must be dismissed because it was not timely filed.

The statutes governing the Board allow filing an appeal within thirty days of the receipt of an order:

Any order issued by the department [of Ecology], the administrator of the office of marine safety, or authority pursuant to RCW 70.94.211, 70.94.332, 70.1.5.095, 43.27A.190, 86.16.020, 88.46.070, or 90.48.120(2) or any provision enacted after July 26, 1987, or any permit, certificate, or license issued by the department may be appealed to the pollution control hearings board if the appeal is filed with the board and served on the department or authority within thirty days after receipt of the order. Except as provided under chapter 70.105D RCW, this is the exclusive means of appeal of such an order. (emphasis added).

RCW 43.21B.310.

In this case, the appeal was properly filed and served within thirty days after receipt of notice of the permit. Notice was provided on October 18, 2000 both through publication in the Washington Register and through mailing. The November 17, 2000 filing was within thirty days of these events. The terms of RCW 43.21B.310 governing timely filing of an appeal before the Board control over any arguably inconsistent regulation adopted by Ecology. State v. Rains, 87 Wn. 2d 626, 631, 555 P. 2d 1368 (1976); Allen v. Employment Sec. Dep't., 83 Wn. 2d 145, 151, 516 P. 2d 1032 (1973). WAC 173-226-190(1) even appears to acknowledge the relevance of the Board statute by stating that appeals will be brought “in accordance with chapter 43.21B RCW.”

The language in WAC 173-226-190(1) discussing appeal within thirty days of the issuance of a general permit is not entirely clear when read in the context of the other provisions governing issuance of a general permit decision. The general permit process established in WAC 173-226 has extensive public notice requirements. Specific methods for advising the public and interested parties are mandated by the regulations. WAC 173-226-130. To begin an appeal period before giving the detailed notice of permit issuance required by WAC 173-226-130(4) and WAC 173-226-170(3) would be inconsistent with the entire structure of the general permit process. In addition, a serious due process question would be raised by technically “issuing” a permit through signature on a document, if notice of the “issuance” was not given until after the thirty-day appeal period. Construing the regulations of WAC 173-226 together, it becomes evident that the issuance of a general permit referred to in WAC 173-226-190(1) cannot be separated from giving notice of its issuance under WAC 173-

226-170(3). C.f., Den Beste v. Pollution Control, 81 Wn. App. 330, 914 P. 2d 144 (1996) (For purposes of determining the timeliness of an administrative appeal under RCW 43.21B.230 the thirty day appeal period begins on the date the notice of the underlying administrative decision is mailed to the appealing party.) In construing these general permit regulations the Board is reading the rules as a whole to harmonize their meaning and render an interpretation consistent with the total regulatory scheme. State v. Williams, 94 Wn. 2d 531, 547, 617 P. 2d 1012 (1980) (quoting State v. Wright, 84 Wn. 2d 645, 650, 529 P. 2d 453 (1974)).

The Board's interpretation of the general permit appeal regulations is also consistent with Ecology's position as expressed in their Notice of Issuance for the Construction Stormwater Permit. The Department specifically identified November 17, 2000 as the deadline for filing appeals. This date is thirty days after the Notice of Issuance was published in the State Register.

Given the Board's interpretation of the relevant regulations and the controlling provisions of the governing statute, RCW 43.21B.310, the motion to dismiss should be denied.

Based upon the foregoing analysis, the Board enters the following:

ORDER

AWB's Motion to Dismiss for failure to timely file the appeal is DENIED.

Done this _____ day of _____, 2001.

POLLUTION CONTROL HEARINGS BOARD

ROBERT V. JENSEN, CHAIR

JAMES A. TUPPER, JR.

KALEEN COTTINGHAM

Phyllis K. Macleod
Administrative Appeals Judge, Presiding